SUPREME COURT, U. S.
OCT 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-5501

UNITED STATES OF AMERICA,
Appellee,

—v.—

OSMUNDO RODRIGUEZ,
Petitioner-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statutes Involved

18 U.S.C. Section 2 Principals

(a) Whosoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. Section 371 Conspiracy to Commit an Offense or to Defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

21 U.S.C. Section 841 Prohibited Acts A—Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense a controlled substance.

18 U.S.C. Section 3501(a)

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be submitted in evidence.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit which affirmed without opinion on September 30, 1974 a judgment of the United States District Court for the Eastern District of New York entered on May 24, 1974 convicting petitioner after a jury trial, of three counts in an indictment charging him with conspiracy to distribute and thereafter distributing to an undercover agent, on two occasions cocaine in violation of Title 21, United States Code, Section 841(a)(1) and 846 and Title 18, United States Code, Section 2. Peti-

tioner was sentenced to a term of two years on each of the three counts in the indictment, these terms to run concurrently. In addition, a special parole term of five years was imposed (Neaher, *D.J.*).

Statement of Questions Involved

1. Whether, petitioner's constitutional and statutory (18 U.S.C. Section 3501(a)) rights were violated because a hearing to determine the admissibility of incriminatory statements attributed to him were held by the trial court in the presence of the jury?

2. Whether, the petitioner's Sixth Amendment right to confrontation were violated?

3. Whether, the trial prosecutor's comments during summation deprived petitioner of a fair trial?

Jurisdiction

The judgment of the Court of Appeals was made and entered on September 30, 1974. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Section 1254(1).

Facts

This case involved a three count indictment which essentially charged the petitioner with distributing approximately six grams of cocaine on June 21, 1972 and sixty grams on June 27, 1972. The third count of the indictment charged a conspiracy from the period beginning June 20, 1972 and concluding June 28, 1972. The Government's evidence in chief may be summarized as follows: On June 21, 1972, Federal Narcotic Agents Abbott and Coughlan went to 265 Hawthorne Street, Brooklyn, New York, in

an effort to purchase one-eighth (⅛) of a kilogram of cocaine from a John Osborne * who, according to evidence adduced at trial, was a well known trafficker in narcotics. The agents were known to Osborne as Ed and Mouse.

Osborne contended he did not have any cocaine in his possession at that time but would contact an associate to see if he could make delivery. According to Osborne, with Agents Abbott and Coughlan within the apartment, he telephoned the petitioner and informed him that he had two customers ". . . who were willing to pay $2.200 for an eighth and can he deliver it to me? He said he would come over later" (R. 196).**

Approximately one hour later the agents, who had left Osborne's apartment, returned and petitioner arrived a short time thereafter. While the agents remained in the living room of the apartment Osborne and Rodriguez went into the kitchen. Upon emerging from the kitchen Osborne gave the agents a quarter of an ounce of cocaine wrapped in aluminum foil as a sample. The agents were then introduced to Rodriguez by Osborne as "Ray" (R. 306-336).

According to Osborne the agents inquired of petitioner if the eighth would be the same as the sample. Petitioner purportedly left and said he would return with the eighth within 45 minutes. The agents paid $100 to Osborne for the quarter of an ounce of cocaine. According to the testimony petitioner did not return on that date and the agents departed. The agents thereafter contacted Osborne who informed them that petitioner had indeed arrived with the

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* John Osborne was jointly indicted with petitioner. His case was severed before the trial commenced and he testified as a Government witness.

** Numerals preceded by "R" reflect the page numbers of the Trial Record and those preceded by "A" indicate the appellant's Appendix on Appeal in the Court below

eighth on June 23, 1972, soon after they had departed. This was June 27, 1972, the subject of Count II of the indictment. At approximately 7:00 P.M. on June 27, 1972 Osborne, as had been pre-arranged with Ed and Mouse (Agents Abbott and Coughlan), sold them two ounces of cocaine for $1,100. Following this transaction the agents left the apartment with Osborne with the understanding they would return later that evening to purchase another two ounces for an additional $1,100. There was testimony that Osborne drove from the area of his domicile in a Pontiac automobile registered to the petitioner. He proceeded to Rodriguez' home at 804 Rogers Avenue, Brooklyn, New York a short distance from the Osborne apartment. Osborne returned to his apartment by bus. The agents soon re-appeared and the three of them awaited petitioner's arrival. After a one-and-a-half hour wait the agents decided to leave but as they reached the lobby of Osborne's apartment building Rodriguez arrived.

The four of them returned to Osborne's apartment. Osborne and petitioner again entered the kitchen while the agents remained in the living room. Upon emerging from the kitchen Osborne gave the agents two ounces of cocaine in return for $1,100. According to the agents and Osborne they inquired that if the cocaine was no good—"who would be responsible?" Osborne accepted responsibility for the quality of the narcotic. Osborne, as aforesaid, testified at trial for the Government. Suffice it to say that Agents Abbott and Coughlan and Osborne's testimony are not at such serious variance that their testimony should be individually summarized.

On July 24, 1972 petitioner was arrested in proximity of his residence at 1:25 P.M. and returned to his apartment. He was given the *Miranda* warnings and then brought to 90 Church Street, Manhattan in New York City the office of the Bureau of Dangerous Drugs, where the *Miranda* warnings were again given. At approximately

4:20 P.M. he was questioned by Assistant United States Attorney Sheerin at the U.S. Courthouse at Cadman Plaza, Brooklyn, in the presence of Agent Coughlan.

A pre-trial motion for discovery was timely made by trial counsel for petitioner. However, not until the very inception of the trial did the Government announce that it intended to utilize an incriminatory statement attributed to petitioner by Agent Coughlan who was physically present when Assistant United States Attorney Sheerin questioned Rodriguez in his office. This information was not contained in the Government's Bill of Particulars. It is an irrefutable fact that Agent Coughlan reduced to writing Rodriguez's statement taken at the office of the United States Attorney (Sheerin).

Notwithstanding the aforesaid omissions this most prejudicial evidence was ultimately received at trial contrary to Rule 16(a) of the Federal Rules of Criminal Procedure.

Reasons for Granting Writ

I.

Agent Coughlan testified that he was present when Assistant United States Attorney Sheerin questioned petitioner on the date of his arrest and recorded incriminating statements allegedly made by him (R. 334, 335; 351-354).

Prior to Agent Coughlan testifying on this specific issue petitioner's counsel sought and was granted by the court a *voir dire* for a ruling as to whether Rodriguez's statements were voluntary and whether the *Miranda* warnings were properly administered by the Assistant United States Attorney in attendance (R. 331-333).

The *voir dire* was conducted in the presence of the jury. The failure of the trial court to determine in the first in-

stance the voluntariness of the statements by petitioner was prejudicial error. Moreover, the foregoing constitutes a direct violation of 18 U.S.C. Section 3501(a).

Insofar as is pertinent, 18 U.S.C. Section 3501(a), reads as follows:

> "(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. *Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be submitted in evidence.* (Emphasis supplied)

Cf. e.g. *Jackson* v. *Denno*, 378, U.S. 368 (1964).

This Court decided simultaneous with *Jackson*, *supra*, the case of *State* v. *Owen*, 94 Ariz. 404 (1963) *vacated* 378 U.S. 574 (1964). In the Owen's case the Court, as here, conducted a voluntariness hearing in the presence of the jury. This was held Constitutional error by this Court.

In *Lopez* v. *State*, (Texas Crim) 366 S.W. 2d 587, *vacated* 378 U.S. 567 (1964) a murder suspect's confession was introduced, and the issue of its voluntariness was submitted to the jury as was in the case at bar. Nevertheless, this court vacated the State judgment occasioned by the fact that the court in the first instance made no independent finding as occurred in the instant case.

Accord--*Harris* v. *State*, 370 S.W. 2d 886 (1963) *vacated* 378 U.S. 572 (1964); *Muschette* v. *United States*, 322 F.2d 989 (1963); *Lego* v. *Twomey*, 404 U.S. 477 (1972).

It is abundantly clear that the defect manifested here was in violation of 18 U.S.C. Section 3501(a). As was stated by this court in *Lego* v. *Twomey*, 404 U.S. at p. 489:

> "To reiterate what we said in Jackson when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered * * * by the trial judge before it is submitted to the jury. Section 3501(a), *supra*."

Agent Coughlan ascribed a total admission of guilt to petitioner. Such being the case the statutory and Constitutional error evidenced here cannot be deemed of a harmless character. Indeed, the Coughlan testimony had originally been reduced to writing and as such should have been produced before trial (A6-A36). *Federal Rules of Criminal Procedure, Rule* 16(*a*). Instead, it was not produced until the eve of trial precluding any effective attempt at suppressing this testimony pre-trial. The meager attempt at a *voir dire* style hearing during trial was replete with error of a Constitutional magnitude. This error should not be construed harmless for it was caused by the Government's failure to do their homework before trial and make aware to the defense that this highly volatile evidence existed and precluded meaningful preparation by defense counsel at trial (A37-A43). Cf. *United States* v. *Salazar*, 485 F.2d 1272 at pp. 1278-79 (2d Cir. 1973); *United States* v. *Feinberg*, 15 Cr.L. 2031 (1974).

II.

On July 24, 1972, at about 1:25 P.M. the petitioner was arrested at his home, 804 Rogers Avenue, Brooklyn, New York by Agent Edward Coughlan and Lynn Wheeler. According to Agent Coughlan, he administered the *Miranda* warnings at that time (R. 327).

Petitioner was then brought in custody to 90 Church Street, New York, N.Y., for processing and where Agent Coughlan again gave the *Miranda* warnings. At this juncture, according to Agent Coughlan, petitioner made one brief statement that involved a man named Tacajo as the supplier of cocaine (R. 328, 329, 332).

At approximately 4:20 P.M., petitioner, still in custody, arrived with the agents at the United States Attorney's office. Petitioner was given the *Miranda* warnings by Assistant United States Attorney Sheerin. Incriminating admissions of guilt were obtained at this time (R. 329-30). The *Miranda* warnings at that juncture were in the form of a writing given to petitioner and entitled "BND For 14-a".

The trial prosecutor in his opening statement to the jury stated in part:

> "* * * the Government will call one other witness. At this time, ladies and gentlemen, I will not reveal his name to you, but in substance his testimony will go to Osmondo Rodriguez supplying John Osborne with the cocaine which was distributed to the undercover agents. Yes, this witness will testify as to the direct participation of Osmondo Rodriguez and these narcotic transactions" (R. 21).

A perusal of the record clearly demonstrates that the unidentified individual alluded to within the prosecutor's opening statement was Assistant United States Attorney Sheerin. Instead of calling Sheerin the Government produced Agent Coughlan who testified to what allegedly transpired between the Assistant United States Attorney and Petitioner Rodriguez.

Agent Coughlan testified that he overheard petitioner admit to Assistant United States Attorney Sheerin that he had used cocaine for about a year; that he had brought "a

quarter of a piece" of cocaine to Agent Abbott and himself on June 22, 1972, at Osborne's apartment; that Rodriguez also admitted to bringing the second half of an eighth of cocaine on the evening of June 27, 1972, to Osborne's apartment; and finally, that petitioner again admitted that his cocaine connection was one Tacajo (R. 334, 335; 351, 352) (A38-A42).

The thrust of petitioner's claim of error in this regard is that the Government failed in its mandatory obligation to call Assistant United States Attorney Sheerin as a witness after the Government assured the jury his direct evidence would be adduced. Manifestly this type of approach tends to subvert the Sixth Amendment right to confrontation within the contemplation of *Douglas* v. *Alabama*, 380 U.S. 415 (1965).

Petitioner asserts that the right to be confronted by Assistant United States Attorney Sheerin is a right granted by the Sixth Amendment that he never waived. The absolute right to cross-examine Sheerin and that the jury should have the benefit of observing Sheerin's demeanor and the opportunity to assess his credibility instead of that of Agent Coughlan's was irretrievably lost to petitioner. Certainly, Agent Coughlan was in no position to speak for Sheerin on the issue of voluntariness. Neither could Coughlan speak for Sheerin as to why he made the petitioner read the *Miranda* warnings and why he choose to interrogate him in the first instance. Obviously this type of approach drastically delimited petitioner to the meager issue as to whether Agent Coughlan accurately overheard the questioning of petitioner by Sheerin.

Parenthetically, it is interesting to note that the record is utterly barren on any valid governmental reason for using Agent Coughlan's hearsay evidence as opposed to Sheerin's direct evidence consistent with the prosecutor's opening statement assurances to the jury.

III.

The trial prosecutor stated to the jury with unusual force:

> "Well, if you believe Agent Coughlan lied, if you believe Agent Abbott lied, if you believe Agent Wheeler lied, if you believe John Osborne lied, then I say to you now ladies and gentlemen—
>
> Mr. Handman: Objection, Your Honor.
>
> Mr. Pascarella: (continuing)—Acquit the defendant" (R. 425) (A44).

The prosecutor's argument was patently improper. It is not a required *sine qua non*, as the prosecutor asserted, that a trial jury in a criminal case must find that Government witnesses have lied before an accused is entitled to an acquittal. The prosecutor's reckless statement rendered ineffectual the teaching that all a jury need find is a reasonable doubt as to the accused's guilt. The error was further intensified by the fact that the erudite trial court omitted to render prompt and curative instructions to the jury. Instead, the jury was permitted to accept the prosecutor's misstatement of the law as a valid truth. In a case as the one at bar, where the petitioner did not testify, and the evidence was not of a lethal character, the petitioner is entitled to a new trial free of such inflammatory trial tactics. The Court's instruction on reasonable doubt buried deep within the main charge after many hours of such improper comment cannot cause such a grave error to dissipate as harmless.

Indeed, in a case as the one at bar which was of short duration, where the prosecutor's summation was delivered the same day, the taking of evidence concluded and the defense summation presented, the impropriety assumes greater significance. Particularly where as here the proof

in this case was certainly not of a clear and convincing character. See, *A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function*, 127 (1971).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5501

OSMUNDO RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court committed plain error in conducting a hearing on the voluntariness of his confession in the presence of the jury; that the government's failure to call a witness violated his Sixth Amendment right to confrontation; and that comments by the prosecutor in summation deprived him of a fair trial.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of three counts of conspiring to distribute and distributing cocaine in violation of 21 U.S.C. 841(a)(1) and 846 and 18 U.S.C. 2. He was sentenced to two years' imprisonment on each of the three counts, the sentences to run concurrently. He was also sentenced to a special parole term of five years. The court of appeals affirmed without opinion (Pet. App.).

The evidence at trial showed that on June 22, 1972, special agents Barry Abbot and Edward Coghlan of the Drug Enforcement Administration, while acting in an undercover capacity, went to the residence of John Osborne.[1] Their object was to arrange for the purchase of cocaine (Tr. 65-67, 306-307). At the apartment Osborne informed the agents that he could get them one eighth of a kilogram of cocaine for $2,200, which would be delivered by a Cuban friend (Tr. 67, 308).[2] Later that evening Osborne notified the agents by phone that the cocaine would be available the following day (Tr. 68, 308).

The following day at about 5:30 p.m. the agents returned to Osborne's apartment. At about 7:00 p.m. petitioner arrived and went into the kitchen with Osborne. Petitioner then produced an ounce of cocaine and gave Osborne a quarter of an ounce to sell to the agents as a sample (Tr. 69-73, 196-198, 308-311). Osborne returned to the living room and gave the sample to the agents. The agents tested it and satisfied themselves that the substance was cocaine. Petitioner then entered the living room and Osborne introduced him to the agents as "Ray." Ray assured the agents that the eighth of a kilogram would be the same quality as the sample and that he would return with it in forty-five minutes (Tr. 73-75, 198-199, 311-312). When petitioner did not return for over an hour and a half, the agents paid Osborne $100 for the sample and advised him that they had to leave and that they would contact him on June 26 (Tr. 75-76, 200-201, 312-313).

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[1]Osborne was indicted along with petitioner. He pleaded guilty to the conspiracy count and was a witness for the government at petitioner's trial.

[2]Petitioner's wife testified that he is from Cuba (Tr. 368).

After unsuccessfully trying to contact Osborne on June 26, the agents did contact him on June 27 and arranged a purchase to be completed in two separate transactions (Tr. 79-83, 201-204, 314-316a). At approximately 8:15 p.m. the agents went to Osborne's apartment. Osborne gave them two ounces of cocaine which he had previously picked up at petitioner's shop, for which they paid $1,100 (Tr. 84-85, 204-205, 246-247, 317). This money was to be taken to petitioner whereupon he would return to Osborne's apartment with two more ounces. That was done: Osborne went to petitioner's shop and gave him the $1,100 (Tr. 183-186, 206-207), then petitioner came to Osborne's apartment with two more ounces, which were given to the agents. Upon satisfying themselves that it was cocaine, they paid Osborne another $1,100 (Tr. 87-91, 207-210, 318-321).

On July 24, 1972, petitioner was arrested by Agent Coghlan. He was advised of his *Miranda* rights at the time of his arrest and again at the office of the Bureau of Narcotics and Dangerous Drugs. Thereafter, petitioner was taken to the United States Attorney's Office where he was again advised of his rights by an Assistant United States Attorney. After indicating to the Assistant that he understood his rights, petitioner confessed to delivering the cocaine sold to Agents Abbot and Coghlan (Tr. 327-335).

Following his indictment, arraignment and plea of not guilty, petitioner moved to discover all statements made by him and in the government's possession (Gov't App. A-1).[3] Pursuant to that motion, the government provided petitioner with a copy of some handwritten notes compiled by the Assistant United States Attorney on July 24, 1972, outlining his interview with petitioner (Gov't App. A-11). Agent Coghlan, who was present at

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[3]"Gov't App." refers to the appendix to the government's brief in the court of appeals, a copy of which has been lodged with this Court.

the interview, also prepared a report of the interview (Gov't App. A-15). On the day trial was to begin, government counsel, who was not the same attorney who had interviewed petitioner, provided defense counsel with a copy of Agent Coghlan's report. He explained that it was not produced earlier because neither he nor the interviewing attorney had been aware of its existence until shortly before trial was to begin (Tr. 9A, 18A). The trial court accepted the government's explanation, finding that there was no deliberate attempt to conceal the report, and refused to suppress the statements or enter any order for failure to comply with discovery pursuant to Fed. R. Crim. P. 16(g) (Tr. 20A).[4]

1. Agent Coghlan testified that petitioner was advised of his *Miranda* rights at the time of arrest and at the time he was brought before the U.S. Attorney (Tr. 327-329). When he began to testify concerning petitioner's statements to the Assistant United States Attorney, defense counsel requested a "voir dire" to "inquire generally about the voluntary nature of any statements * * * " (Tr. 329-321).[5] The court granted this request and defense counsel, in the presence of the jury, questioned Agent Coghlan about the circumstances surrounding the petitioner's statement to the Assistant United States Attorney

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[4]Petitioner did not request a continuance pursuant to Rule 16(g), and, as noted, the government did provide the agent's report prior to trial.

[5]During the opening day of trial, defense counsel expressly declined to ask for a voluntariness hearing at that time. He requested instead that he be given a *voir dire* at the time any statements were to be introduced (Tr. 21A-22A).

(Tr. 331-333). Petitioner contends that the holding of the *voir dire* in the presence of the jury violated 18 U.S.C. 3501(a).[6]

At the time of the *voir dire*, defense counsel made no request that it be held outside the jury's presence. In fact, defense counsel sought to use the jury's presence to petitioner's advantage by exploring the reasons why the *Miranda* rights were explained to petitioner repeatedly, in an apparent attempt to challenge petitioner's understanding of his rights (Tr. 331-332). In light of defense counsel's failure to object to the presence of the jury, the trial court was under no duty *sua sponte* to excuse the jury. *Pinto* v. *Pierce*, 389 U.S. 31, 33; *United States* v. *Everett*, 457 F. 2d 813, 814 (C.A. 9); *Lott* v. *United States*, 445 F. 2d 858 (C.A. 9); *United States* v. *Monroe*, 437 F. 2d 684, 686 (C.A.D.C.); *United States* v. *Smith*, 418 F. 2d 1294,1295 (C.A. 5).

Significantly, this examination brought out no controverted facts or issues concerning the voluntariness of the confession. Agent Coghlan had already testified, without objection, that petitioner had been informed of his rights twice before the interview with the Assis-

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[6]18 U.S.C. 3501(a) reads:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

tant United States Attorney and that petitioner had understood them. There was no objection on grounds of voluntariness either before or immediately after the *voir dire*. Defense counsel simply stated that he wanted to inquire generally about the circumstances of the confession. Only the next trial day, after the government had rested its case, did defense counsel move for a mistrial on the ground that the *Miranda* warnings "were not thorough enough" (Tr. 389). This motion was denied.[7] Thus, as there was no genuinely disputed fact concerning the voluntariness of the confession, and as the petitioner did not timely object to the procedure used and presumably consented to it, the court was under no duty under 18 U.S.C. 3501(a) to hold a hearing outside the jury's presence.[8]

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[7]After the *voir dire*, defense counsel again objected to the testimony of Agent Coghlan on the ground that the government had not complied with the discovery order by withholding Agent Coghlan's report (Tr. 334). The trial court correctly overruled this objection in light of the facts that (1) defense counsel never requested any relief provided for in Fed. R. Crim. P. 16(g) other than the drastic (and unnecessary) sanction of denying the government the use of Agent Coghlan's testimony and (2) petitioner could not have been prejudiced by the inadvertently late disclosure since he had received the notes of the Assistant United States Attorney over a year prior to trial, and those notes contained the same information as Agent Coghlan's report. See *United States* v. *Knohl*, 379 F. 2d 427, 442 (C.A. 2), certiorari denied, 389 U.S. 973; cf. *Killian* v. *United States*, 368 U.S. 231, 243-244.

[8]*Jackson* v. *Denno*, 378 U.S. 368, and *Lego* v. *Twomey*, 404 U.S. 477, cited by petitioner (Pet. 6, 7), are inapposite. *Jackson* struck down the New York procedure for allowing the jury to determine the voluntariness of a confession where there are disputed facts at issue, while *Lego* v. *Twomey* concerned the quantum of proof necessary for the trial court to determine the voluntariness of a confession. The last two lines in petitioner's quotation from *Lego* v. *Twomey* (Pet. 7) suggesting that that decision requires a hearing before the judge before submission to the jury, citing 18 U.S.C. 3501(a), are not found in that opinion. In fact, the Court expressly stated that 18 U.S.C. 3501(a) was inapplicable to that case (404 U.S. at 486, fn. 14).

Assuming, *arguendo*, that the trial court should have ordered the jury excused during the *voir dire*, the error was harmless in light of the uncontroverted facts supporting the voluntariness of the confession.

2. During his opening statement, the prosecutor informed the jury that he would call a witness, unidentified at the time, who would testify concerning the direct participation of petitioner in the narcotics transactions at issue (Tr. 21). Petitioner contends that the prosecutor was referring to the Assistant United States Attorney who interviewed petitioner and that the failure to call that attorney as a witness denied petitioner his Sixth Amendment right of confrontation.

This contention is incorrect. First, the record makes it clear that the prosecutor was not referring to the Assistant United States Attorney in this portion of his opening statement. This Assistant could not testify to the *direct* participation of petitioner. Other than the witnesses named in the prosecutor's opening statement, the only other person who could testify to petitioner's direct participation was John Osborne. Osborne did, in fact, testify. Furthermore, the government was under no obligation to call the Assistant to testify. The government called Agent Coghlan, who was present at the interview when petitioner confessed, and thus effectively placed petitioner's statements into evidence. If petitioner felt it necessary to examine the Assistant concerning these events, he was free either to call the Assistant as a witness or ask the court to call the Assistant as a court witness.

3. Finally, petitioner contends that reversible error was committed when the prosecutor told the jury that if they believed the government witnesses lied then they should

acquit petitioner (Tr. 425). Petitioner's position is that the prosecutor improperly asserted that the jury was required to find that the government witnesses lied before it could bring in a verdict of acquittal.

When viewed in the context of defense counsel's summation, it is clear that the prosecutor's comments were not improper. During his summation, defense counsel repeatedly placed the credibility of John Osborne and Agents Abbott and Coghlan in question (Tr. 396-422). In response to this, the prosecutor did no more than state that if the jury believed that the government's witnesses lied they should acquit petitioner, but if they believed the witnesses told the truth they should hold petitioner accountable. Contrary to petitioner's contention, the prosecutor did not tell the jury that to acquit petitioner it was necessary to find that the agents and Osborne lied. Rather than misstating the law, the prosecutor simply and properly framed the issue of credibility.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

DOJ-1974-12